IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16311 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHIKHABHAI TULSIBHAI

Versus

GENERAL MANAGER WESTERN RAILWAY

Appearance:

1. Special Civil Application No. 16311 of 2003

MR BG PATANI for Petitioner No. 1

MR SN SINHA for Respondent No. 1-3

MR SAMIR J DAVE for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 14/07/2004

ORAL JUDGEMENT

Rule. Mr.S.N.Sinha waives service of notice of rule on behalf of respondent No.1 to 3 and Mr.Samir Dave

waives service of notice of rule on behalf of respondent No.4. At the joint request of the learned advocates for the parties, the petition is taken up for final disposal today.

2. Learned advocate for the petitioner seeks permission to delete the portion of prayer clause (B) of para 12 of the petition by which he has prayed for issuance of writ of mandamus directing the respondent No.2 to reinstate the petitioner in service with full backwages and for quashing and setting aside the order at Annexure dated 3.4.2000. Permission is granted as prayed for. He, however, maintains the challenge with respect to the order passed by the respondent No.4 by which the respondent No.4 has decided not to refer the dispute for adjudication. This petition is, therefore, considered and decided with respect to the limited challenge of the petitioner against the order dated 13.1.2003 by which the respondent No.4 communicated to the petitioner that the Ministry does not consider the dispute fit for adjudication for the reasons stated therein.

3. The petitioner who was employed by the respondent Nos.1 to 3 came to be punished pursuant to a departmental inquiry and penalty of removal from service was imposed upon him. The petitioner challenged this order by filing an appeal which came to be rejected. The petitioner, thereafter, filed review application wherein the Competent Authority converted the order of removal from service into one of compulsory retirement. Being aggrieved by the said order of penalty of compulsory retirement, the petitioner sought to raise an industrial dispute. It is not in dispute that the Conciliation Officer submitted his report of failure upon conciliation having failed. The matter was thereafter placed before the respondent No.4 for taking a decision whether the dispute is to be referred for adjudication or not. It was in this regard that the order dated 13.1.2003 came to be passed stating, inter alia, that the Ministry does not consider the dispute fit for adjudication for the following reasons:

> "As per the observations of the Apex Court in respect of the case between State of U.P. and others v/s. Vijay Kumar Jain (2002-II-LLJ) that ana order of compulsory retirement was neither punishment nor one attached with stigma, the case of disputant is not maintainable as the management had taken a lenient view in his case and sent him on compulsory retirement instead of dismissal with all superannuation benefits."

From the reasons stated in the impugned order dated 13.1.2003, it can be seen that the respondent No.4 has decided that the dispute is not fit for adjudication on the ground that as per decision of the Hon'ble Supreme Court, the order of compulsory retirement is neither punishment nor attaches any stigma. Another reason indicated in the said order is that the Management has taken a lenient view and has imposed punishment of compulsory retirement instead of dismissal from service. It is painful to note that the reasons are neither germane nor permissible to be adopted by the respondent No.4 for passing the said order. Both the reasons communicated are self-contradictory and demonstrate a total lack of application of mind on the part of the respondent No.4. On the one hand, respondent No.4 states that the order of compulsory retirement is neither a punishment nor attaches stigma and in the same breath, it is stated that the employer has been lenient in compulsorily retiring the petitioner instead of dismissing him. If the order of compulsory retirement was not a penalty, where is the question of comparing the same with that of dismissal and holding it to be lenient is what this Court is not in a position to understand.

4. The respondent No.4 has clearly misunderstood the issue placed before it. Admittedly, the order of compulsory retirement was passed pursuant to a departmental inquiry and by way of penalty. How such an order is not an order of penalty is difficult to understand. In the same breath, respondent No.4 also holds that the employer has been lenient in awarding penalty. Under no provision of law respondent No.4 was permitted or required to go into the quantum of penalty as the role of the respondent No.4 was only to decide whether in the facts of the case, the industrial dispute was required to be referred for adjudication or not. Large number of decisions of the Hon'ble Supreme Court has by now made it clear that it is not the duty of the appropriate Government to decide the lis while deciding the question whether a dispute has to be referred for adjudication or not. In a decision reported in AIR 2002 SC 1724 (Sharad Kumar v. Govt. of NCT of Delhi), the Hon'ble Supreme Court once again reiterated the said legal position and came to the conclusion that the State Government could not arrogate on to itself the power to adjudicate on the question and hold that the employee was not a workman within the meaning of section 2(s) of the Industrial Disputes Act thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal or the Labour Court on the

basis of material to be placed before it by the parties.

5. In view of the above discussion, I find that the impugned order dated 13.1.2003 as at Annexure D is totally illegal and unlawful. The respondent No.4 has exercised powers not vested in it and thereby passed order which is without proper authority or jurisdiction. In this view of the matter, I have no choice but to quash and set aside the impugned order and remand the matter to the respondent No.4 for fresh consideration with respect to the question whether the dispute sought to be raised by the petitioner is required to be referred for adjudication before the Labour Court/Industrial Tribunal or not keeping in view the above observations made by this Court.

6. With the above directions, the petition stands allowed to the above extent. Rule is made absolute accordingly with no order as to costs.

(Akil Kureshi, J.)
(vjn)